Supreme Court, U. S.
FILED
MAY 28 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. **79-1883**

WESTINGHOUSE ELECTRIC CORPORATION,
PETITIONER, et al.

vs.

JUDITH HUNTER, et al.
RESPONDENTS

PETITIONER WESTINGHOUSE ELECTRIC CORPORATION'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Michael J. Renner, Esq.
Bricker & Eckler
100 East Broad Street
Columbus, Ohio 43215
Attorneys for Petitioner
Westinghouse Electric Corporation

Michael K. Gire, Esq.
of Counsel
Bricker & Eckler
100 East Broad Street
Columbus, Ohio 43215

John Eckler

INDEX

	Page
Citations	ii
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutory and Constitutional Provisions	2
Statement of Facts	3
Reasons Relied on for Allowance of Writ	5
Conclusion	14
Appendix A	1-A
Appendix B	1-B

CITATIONS

CASES:

Alexander v. Gardner-Dener Co.,
415 U.S. 36 (1947) 6

Campbell v. Holt,
115 U.S. 620 (1885) 12

Chase Securities Corporation v. Donaldson,
3254 U.S. 304 (1945) 12, 13

Dandridge v. Williams,
397 U.S. 471 (1970) 14

Danzer v. Gulf & Ship Island Railroad Co.,
268 U.S. 633 (1925) 12

Gavin v. Press,
347 U.S. 522 (1954) 11

Inda v. United Airlines, Inc.,
565 F.2d 554 (9th Cir. 1977)
cert. den., 435 U.S. 1007 (1978) 5, 9

International Union of Electrical Workers, Local 790 v. Robbins & Myers, Inc.
429 U.S. 229, (1976) 5, 7, 8, 9, 10, 11

United Air Lines v. Evans,
431 U.S. 553 (1977) 5, 11, 12

Usery v. Turner Elkhorn Mining Co.,
428 U.S. 1 (1976) 12, 14

Wood v. Southwestern Bell Telephone Co.,
580 F.2d 339 (8th Cir. 1978) 5, 9

STATUTES:

28 U.S.C. §1254(1) 2

29 U.S.C. 185 4

42 U.S.C. §2000e 2, 3, 4, 5

Pub. L. No. 92-261 §4, 86 Stat. 103 3

Pub. L. No. 92-261 §14, 86 Stat. 103 3

In the Supreme Court of the United States

OCTOBER TERM, 1979

No.

WESTINGHOUSE ELECTRIC CORPORATION,
PETITIONER, et al.

vs.

JUDITH HUNTER, et al., RESPONDENTS

PETITIONER WESTINGHOUSE ELECTRIC CORPORATION'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Westinghouse Electric Corporation, the petitioner herein, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1-A) is unreported. The United States District Court for the Southern District of Ohio dismissed plaintiffs Hunter and Vance without opinion (App. A, *infra*, 3-A) and is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra* 1-B) was entered on February 28, 1980. The jurisdiction for this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS PROPERLY INTERPRETED THE 1972 AMENDMENTS TO TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 BY RETROACTIVELY APPLYING SAID AMENDMENTS TO REINSTATE CHARGES UNTIMELY FILED IN 1970.

2. WHETHER IT VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO RETROACTIVELY APPLY A LESISLATIVE ENACTMENT IN A MANNER THAT REINSTATES RIGHTS THAT HAD BEEN EXTINGUISHED, THAT RESULTS IN UNEQUAL TREATMENT OF PERSONS SIMILARLY SITUATED, AND THAT RESULTS IN AN ABRITRARY AND IRRATIONAL ADMINISTRATION OF SAID LEGISLATION.

STATUATORY AND CONSTITUTIONAL PROVISIONS

The relevant statutory provisions at issue in this case under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.) are as follows:

1. 42 U.S.C. §2000e-5(d) (prior to 1972 amendments) which provides in part:

"Charges under sub-section (a) shall be filed within ninety (90) days after the alleged unlawful employment practice occurred . . .";

2. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 §4, 86 Stat. 103 (amending 42 U.S.C. §2000e-5[d]), which provides in part:

"A charge under this section shall be filed within one hundred and eighty (180) days after the alleged unlawful employment practice occurred . . ."

3. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 §14, 86 Stat. 103 (amending 42 U.S.C. §2000e-5[d]), which provides:

"The amendments made by this Act to (42 U.S.C. §2000e-5) shall be applicable with respect to charges pending with the Commission on the date of this Act and all charges filed thereafter."

The relevant constitutional provision at issue in this case is the Fifth Amendment, which provides in part:

". . . nor deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF FACTS

1. The three plaintiffs in this action (Marlene Campbell, Shirley Vance and Judith Hunter) were formerly employed by Westinghouse at its Byesville, Ohio plant. Each participated in an illegal work stoppage on September 10, 1969, and were terminated by Westinghouse on September 26, 1969, because Westinghouse determined after an investigation that they were the instigators of the illegal strike.

2. Plaintiff Campbell filed a charge alleging sex discrimination with the Equal Employment Opportunity Commission ("EEOC") on December 2, 1969. This charge was filed within ninety (90) days of the

alleged act of discrimination, and the timeliness of plaintiff Campbell's charge of discrimination is not in issue.

3. Plaintiffs Hunter and Vance filed charges alleging sex discrimination with the EEOC on February 27, 1970. These charges were filed one hundred fifty-four (154) days after the alleged act of discrimination, and were, therefore, untimely under 42 §2000e-5(d) as it read at that date.

4. The EEOC treated the charges of Hunter and Vance as timely filed, but did not notify petitioner Westinghouse Electric Corporation or its successor and co-defendant, Scoville Manufacturing Company, of said charges until August 8, 1974, nearly five years after the alleged act of discrimination.

5. On May 8, 1972, over two and one-half (2-1/2) years after the alleged discriminatory act but more than two (2) years before the employer was notified of the charge, petitioner Westinghouse Electric sold its Byesville plant to Scoville Manufacturing causing some plant records to be delivered to Scoville, others to be transported to different Westinghouse facilities, and important plant management personnel to be scattered throughout the country.

6. On May 10, 1976, the EEOC issued "right to sue" letters to plaintiffs Campbell, Hunter and Vance, and on June 24, 1976, suit was instituted in the United States District Court for the Southern District of Ohio, pursuant to the federal jurisdiction granted by 42 U.S.C. §2000e-5 and 29 U.S.C. 185.

7. On motion of the co-defendants based upon the failure of plaintiffs Hunter and Vance to file timely charges with the EEOC, the District Court dismissed,

without opinion, Hunter and Vance from the lawsuit. On appeal to the United States Court of Appeals for the Sixth Circuit, the dismissal of Hunter and Vance was reversed. The court of appeals found that the expansion of the time to one hundred eighty (180) days for filing charges of discrimination with the EEOC enacted as part of the 1972 amendments to 42 U.S.C. §2000e-5 was applicable to the untimely charges filed by Hunter and Vance.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I. INTERPRETATION OF THE 1972 AMENDMENTS TO THE CIVIL RIGHTS ACT OF 1964

The decision of the United States Court of Appeals for the Sixth Circuit in this case on the retroactivity of the 1972 amendments to the Civil Rights Act of 1964 (hereinafter referred to as the "1972 amendments") together with the decision of the Ninth Circuit in *Inda v. United Airlines, Inc.*, 565 F.2d 554 (9th Cir. 1977), *cert. den.*, 435 U.S. 1007 (1978) and the Eighth Circuit in *Wood v. Southwestern Bell Telephone Co.*, 580 F.2d 339 (8th Cir. 1978), raise an important questional of federal law that was recognized by this Court in *International Union of Elec. Workers, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 243 n.17 (1976), but was not therein addressed: Does the enlarged limitation period of the 1972 amendments redound to benefit persons who filed a charge more than 90, but less that 180, days from the date of the alleged "occurrence" where the 180 days had run

prior to March 24, 1972 (the effective date of the 1972 amendments)?

The time limitation for filing a charge with the EEOC is a jurisdictional prerequisite that an individual must satisfy before being entitled to bring a suit in the federal courts. "[Title VII] specifies with precision the jurisdictional prerequisite that an individual must satisfy before he is entitled to institute a lawsuit." One of the prerequisites is to "[file] timely a charge with the Commission." *Alexander v. Gardner-Dener Co.*, 415 U.S. 36, at 47, (1974). As this Court has stated:

> "A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences. *United Air Lines v. Evans*, 431 U.S. 553, at 558 (1977).

From the language in *United Air Lines v. Evans, supra*, it is clear that the timely filing of a charge with the EEOC is a jurisdictional prerequisite to maintaining an action under Title VII and the failure to file a timely charge destroys a claimant's right to avail himself of the rights created by Title VII. The question then presented is whether the 1972 amendments can be retroactively applied to reinstate an otherwise untimely charge of discrimination that is "... the legal equivalent of a discriminatory act which occurred before the statute was passed." *United Air Lines v. Evans, supra,* at 558.

In *International Union of Electrical Workers v. Robbins & Myers, Inc., supra* (hereinafter referred to as *"Electrical Workers"*), this Court had the opportunity to consider the retroactivity of the 1972 amendments. *Electrical Workers* involved a charge that was filed more than 90 days after the alleged discriminatory act, but within 180 days of March 24, 1972, the effective date of the 1972 amendments. This Court reviewed the applicable statute and observed:

> Robbins & Myers also contends that the amendment is not applicable to the charge filed by Guy with the EEOC, since, being untimely when filed, her charge could not have been "pending with the Commission on the date of enactment of this Act." This reading of "pending" — confining to charges still before the Commission and timely when filed — is not the only possible meaning of the word, is largely rebutted by the legislative history, and renders the language of §14 virtually meaningless insofar as the enlarged limitations period is concerned. Since Congress also applied the enlarged limitations period to charges, whether or not untimely on March 24, "filed thereafter," *we should not presume Congress created this odd hiatus in retroactivity suggested by Robbins & Myers unless congressional intent to do so was conveyed by language more precise than "pending,"* cf. *Love v. Pullman Co.*, 404 U.S. 522, 30 L. Ed. 2d 679, 92 S. Ct. 616 (1972). "Pending" is simply not a term of art that unambiguously carries with it a meaning precisely suited for this situation; equally logical, for example would be an interpretation that read "pending" to mean "filed and not yet rejected," cf. *Committee Legis. Hist., supra,* n.16, at 1851. We hold that Congress intended the 180-day

> period to be applicable to charges such as that filed by Guy, where the charge was filed with the EEOC prior to March 24, 1972, and alleged a discriminatory occurrence within 180 days of the enactment of the Act. 429 U.S., at 242. (emphasis added) (footnotes omitted).

In footnote 17, however, this Court expressly declined to rule on whether the enlarged time limitations would apply to discriminatory acts which occurred more than 180 days prior to March 24, 1972.

The logic of *Electrical Workers* in treating, as timely, charges filed concerning acts occurring within 180 days of the new amendments is readily apparent. To illustrate, it would make no sense to distinguish between two claims based on discriminatory acts occurring 179 days before March 24, 1972 simply because one claimant filed an untimely charge with EEOC 91 days after the occurence, while the other claimant initially filed his charge on March 25, 1972. Clearly the latter would have a valid claim because March 25, 1972 is within 180 days of the alleged discrimination. But in the absence of the retroactive application applied in *Electrical Workers* the first claimant would be arbitrarily penalized for filing before the act rather than after the act. This is the "*odd hiatus*" referred to in *Electrical Workers*. The same rationale, however, would not be applicable to discriminatory acts occurring more than 180 days prior to March 24, 1972, for in that case no one would have a right to file for the first time on March 25, 1972. It is apparent that this Court was cognizant of this distinction because otherwise there would have been no need to limit the holding in *Electrical Workers* to claims

arising within 180 days of March 24, 1972.

The Ninth Circuit in *Inda v. United Air Lines, Inc.*, *supra*, was the first court of appeals, after the *Electrical Workers* decision, to consider the retroactivity of the 1972 amendments to untimely charges filed more than 180 days prior to March 24, 1972. After reviewing this Court's opinion in *Electrical Workers*, the Ninth Circuit concluded:

> "If the charge was, on the date of enactment, on file with the Commission, and if final action had not yet been taken by the Commission with respect to the charge, the charge was pending in the sense in which that term is commonly used. It is that sense that we have attributed to Congress." 565 F.2d 554, at 561.

The Tenth Circuit followed *Inda* in *Wood v. Southwestern Bell Telephone Co.*, *supra*, wherein the Court stated:

> "The basis for the Court's decision in *Electrical Workers* was that "pending cases" logically means cases on which the EEOC has yet to take final action. In our opinion this reasoning extends to all cases pending, and not simply those in which the discriminatory act occurred within 180 days of the amendment. This one factual difference does not provide any reasonable basis on which a different result in this case could be distinguished.

In the instant case the Sixth Circuit based its decision on *Inda* and *Wood* (App. A, *infra*, 1-A).

Thus, three courts of appeals have considered this issue after *Electrical Workers* and have determined that there is not a distinction between cases that were untimely more than 180 days prior to March 24, 1972, and cases that were filed within

180 days of March 24, 1972. The petitioner respectfully submits that the circuit courts, in so holding, have improperly interpreted this Court's decision in *Electrical Workers* by not taking into consideration that the "*odd hiatus*" presented by charges filed within 180 days of the 1972 amendment is not present in charges filed more than 180 days prior to March 24, 1972, and by failing to recognize that this Court in *Electrical Workers* specifically limited its holding to charges filed within 180 days of March 24, 1975.

> "We hold that Congress intended the 180 day period to be applicable to charges such as that filed by Guy, where the charge was filed with the EEOC prior to March 24, 1972, and alleged a discriminatory occurrence within 180 days of the enactment of this Act." 429 U.S., at 243.

2. A RETROACTIVE APPLICATION OF LEGISLATIVE ENACTMENT THAT OPERATES IN AN UNEQUAL AND ARBITRARY MANNER IS UNCONSTITUTIONAL

Under the *Electrical Workers* decision the expanded time limit of the 1972 amendments inures to the benefit of all persons who filed a charge based upon an alleged discriminatory act occurring within 180 days of March 24, 1972. This holding is consistent with the clear language and legislative intent of the 1972 amendments because any such person so situated would have had the right to file a timely charge on March 24, 1972. Retroactive application of the 1972 amendments in this circumstance is merely an expansion of the existing remedy

that was available to all persons similarly situated alleging a discriminatory act occurring within 180 days of the effective date of the 1972 amendments. This type of retroactive application of legislation is clearly constitutional, and this Court so found in *Electrical Workers*. Indeed, it is not really a retroactive application. Under *Electrical Workers*, the statute is given immediate prospective effect in that on March 24, 1972, and at anytime thereafter, an individual may file a discrimination charge alleging a wrongful act occurring within the preceeding 180 days.

If, as the circuit courts have found, such principal should be expanded retroactively to include claims which could not be timely brought by filing anew on March 24, 1972, then the retroactivity of the 1972 amendments (i) operates in an essentially, *ex post facto* fashion by creating a right in an untimely charge from an alleged discriminatory act that is ". . . the legal equivalent of a discriminatory act which occurred before the statute was passed," *United Air Lines v. Evans, supra*, at 553; (ii) provides for unequal treatment of employers and employees who are similarly situated; and (iii) creates an arbitrary and capricious application of statutory rights created under Title VII. All three of these results are violative of the fundamental fairness embodied in the due process clause of the Fifth Amendment.

The prohibition against "ex post facto laws" contained in Article I §8, cl. 18 of the Constitution of the United States has been held to apply only to prosecutions of crime, *Galvin v. Press*, 347 U.S. 522 (1954), but in the civil context it has been recognized by this

Court that while retrospective legislation may be constitutionally permissible, such legislation must meet the test of due process. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). In *United Air Lines v. Evans, supra*, this Court characterized an untimely filed charge under Title VII to be: ". . . the legal equivalent of a discriminatory act which occurred before the statute was passed . . . it is merely an unfortunate event in history which has no present legal consequences." 431 U.S., at 558. If as *Evans* suggests, a party filing a late claim stands in the same position as a party who suffered discrimination before Title VII was enacted, then the retroactive application of the 1972 amendments by the circuit courts creates a liability for employers such as Westinghouse that controvenes the basic notions of fairness embodied in the due process clause of the Fifth Amendment by retrospectively creating a liability years later that had never previously existed. Thus, unlike the situation in *Campbell v. Holt*, 115 U.S. 620 (1885) and *Chase Securities Corporation v. Donaldson*, 325 U.S. 304 (1945), it is not merely the remedy that is affected; it is the original cause of action that is a nullity. To give retrospective effect to the legislative enactment in the latter instance is a deprivation of Westinghouse's property without due process in controvention of the Fifth Amendment. *Danzer v. Gulf & Ship Island Railroad Co.*, 268 U.S. 633 (1925). As this Court has stated:

> "In the William Danzer & Co. Case it was held that where a statute in creating a liability also put a period to its existence, a retroactive ex-

tension of the period after its expiration amounted to a taking of property without due process of Law." *Chase Securities Corporation v. Donaldson, supra,* at 311 n. 8.

The second constitutional flaw in the decisions of the circuit courts in retroactively applying the 1972 amendments to untimely charges arising from alleged discriminatory acts taking place more than 180 days prior to March 24, 1972, is the disparate treatment that results for persons similarly situated. Unlike the situation covered in *Electrical Workers* of persons who filed charges based upon alleged discriminatory acts occurring within 180 days of March 24, 1972, where all are treated equally, the retroactive application of the 1972 amendments to charges stemming from discriminatory acts occurring more than 180 days prior to March 24, 1972, results in an irrational classification of persons similarly situated. On one hand there is the class of employees whose rights have been foreclosed and employers whose potential liability has been extinguished because the EEOC *properly* handled and dismissed the charge as untimely. On the other hand, there is the class of employees who are blessed with the retroactive application of the 1972 amendments and employers who have for the first time been placed in jeopardy because the EEOC either *improperly* handled the charge, or failed to act at all.[1] Such a classification based upon the fortuity of administrative incompetence or overload lacks a "reasonable basis,"

[1]Petitioner asserts that proper administrative handling of a charge alleging a discriminatory act occurring in 1969 and filed more than 90 days thereafter would have been to promptly dismiss the charge, or at least to have dismissed the charge in less than 2-1/2 years.

Dandridge v. Williams, 397, U.S. 471, at 501 (1970). To avoid the unconstitutional classification, all past charges filed within 180 days of the alleged act of discrimination would have to be treated as timely, whether or not the EEOC had previously dismissed them. But, there is no room in the statutory language for such an interpretation. No reasonable basis being shown for the classification adopted by the Court of Appeals herein, that classification is without constitutional footing.

Finally, the 1972 amendments as interpreted by the courts of appeals, are arbitrary and irrational in application in that employers are only subjected to potential liability if the EEOC improperly failed to dismiss an untimely charge. And, ironically, the more egregious the delay on the part of the EEOC in failing to dismiss the untimely charge, the greater the potential liability for the employer. This arbitrary and irrational retroactive application of the law constitutes a violation of employers' due process rights. *Usery v. Turner Elkhorn Mining Co., supra.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael J. Renner
Bricker & Eckler
100 East Broad Street
Columbus, Ohio 43215
Attorneys for Petitioner
Westinghouse Electric Corporation

APPENDIX "A"

No. 77-3473

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JUDITH HUNTER and SHIRLEY VANCE,
Plaintiffs-Appellants,

v.

WESTINGHOUSE ELECTRIC CORPORATION; HAMILTON BEACH DIVISION, SCOVILL MANUFACTURING COMPANY and THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Local 2196,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed February 28, 1980.

Before: WEICK, LIVELY and MERRITT, Circuit Judges.

PER CURIAM. This appeal raises the same issue decided by the Ninth Circuit in *Inda* v. *United Airlines, Inc.*, 565 F.2d 554, 560 (1977) and by the Eighth Circuit in *Wood* v. *Southwestern Bell Telephone Co.*, 580 F.2d 339 (1978), namely: whether the statutory amendment allowing 180 days rather than 90 days for filing Title VII sex discrimination charges with the Equal Employment Opportunity Commission applies to sex discrimination charges still pending before the Commission but filed more than 180 days prior to the effective date of the amendment. When Congress amended Title VII in 1972 to extend the 90-day period to 180 days, 86 Stat. 103,

42 U.S.C. § 2000e-5(e) (1976), it provided in § 14 that the amendments "shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter." 86 Stat. 113.

On February 27, 1970, about 154 days after discharge, plaintiffs Vance and Hunter filed sex discrimination charges with the Commission. The Commission accepted the charges and treated them as timely. It issued determinations on January 6 and 7, 1976, that there was reasonable cause to believe that the claims of all three women were true. Conciliation efforts failed, and the Commission issued to plaintiffs a notice of their right to sue.

Suit was timely filed. The defendants, Westinghouse Electric Corp., and its successor in interest, Scovill Manufacturing Company, moved to dismiss the claims for failure to file timely EEOC charges. They contended that the charges had not been filed within 90 days of the discharges and were, therefore, beyond the 90-day limitation period specified for charges at the time of filing. The District Court granted the motion without stating a reason.

For the reasons fully set out in the opinions of the Ninth and Eighth Circuits in *Inda* and *Wood*, *supra*, we join those Circuits in holding that the word "pending" in the above-quoted statutory amendments includes charges filed with the Commission more than 180 days prior to the enactment of the amendments, so long as the Commission, as here, had not yet formally acted upon the charges.

Accordingly, the judgment of the District Court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
JUN 2 3 2...
EAST. DIV. COLUMBUS

Judith Hunter, et al., :

Plaintiffs :

-v- :

Case No. C-2-76-469

Westinghouse Electric Corporation, et al., :

Defendants :

O R D E R

Upon consideration, the motions to dismiss are GRANTED as to plaintiffs Judith Hunter and Shirley Vance, and DENIED as to plaintiff Marlene Murray.

So ORDERED.

Robert M. Duncan, Judge
United States District Court

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

FEB 29 1980

JOHN P. HEHMAN, Clerk

No. 77-3473

JUDITH HUNTER and
SHIRLEY VANCE,

Plaintiffs-Appellants,

v

WESTINGHOUSE ELECTRIC CORPORATION;
HAMILTON BEACH DIVISION, SCOVILL
MANUFACTURING COMPANY and THE
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, Local 2196,

Defendants-Appellees.

Before: WEICK, LIVELY and MERRITT, Circuit Judges.

J U D G M E N T

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded for further proceedings.

It is further ordered that Plaintiffs-Appellants recover from Defendants-Appellees the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT.

John P. Hehman
Clerk

Issued as Mandate: March 28, 1980

A True Copy.

COSTS: (To be recovered by appellants)

Attest:

Filing fee.....	$ 50.00
Printing	$-----
Total	$ 50.00

Deputy Clerk

Supreme Court, U. S.
FILED
JUL 2 1980
MICHAEL RODAK, JR., CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1883

WESTINGHOUSE ELECTRIC CORPORATION,
PETITIONER, et al.

vs.

JUDITH HUNTER, et al.,
RESPONDENTS.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Alexander M. Spater, Esq.
SPATER, GITTES & TERZIAN
595 East Broad Street
Columbus, Ohio 43215
Attorneys for Respondent
Judith Hunter, et al.

Barbara A. Terzian, Esq.
of counsel
SPATER, GITTES & TERZIAN
595 East Broad Street
Columbus, Ohio 43215

INDEX

	Page
Citations	ii
Statement of Facts	1
Reasons Why This Cause Should Not Be Reviewed	4
Conclusions	18

CITATIONS

CASES:

Adams v. Brinegar,
521 F.2d. 129
(7th Cir. 1975) 12

Brown v. General Services
Administration,
507 F.2d 1300 (2d
Cir. 1974), aff'd 42
U.S. 820 (1976) 12

Chase Securities Corp. v.
Donaldson,
325 U.S. 304 (1945) 11

Hunter v. Westinghouse
Electric Corp.,
616 F.2d 267 (6th
Cir. 1980) 5

Inda v. United Airlines, Inc.,
565 F.2d 554 (9th Cir.
1977) cert. den., 435
U.S. 1007 (1978) 5,9

International Union of
Electrical Workers,
Local 790 v. Robbins
& Myers, Inc.,
429 U.S. 229 (1976) passim

McDonald v. United Air Lines, Inc.
587 F.2d 257 (7th Cir. 1978) 5

Occidental Life Ins. Co. v. EEOC
432 U.S. 355 (1977) 16

Wood v. Southwestern Bell
Telephone Co.,
580 F.2d 339 (8th Cir. 1978) 5

STATUTES

42 U.S.C. 2000 e-5 2,3,6

Pub.L.No. 92-261 14,
86 Stat. 103 6

118 Cong. Rec. 7161, 7167
(1972) 13

STATEMENT OF FACTS

1. More than 200 of the approximately 220 persons employed by defendant Westinghouse at its Byesville, Ohio plant, including the plaintiffs, participated in a work stoppage on September 10, 1969.

2. Although one-half of the employees who participated in the work stoppage were males, only five females were fired. Among those fired were the plaintiffs. The plaintiffs were not instigators of the strike nor did they participate to any greater extent than any other employee.

3. Plaintiffs Hunter and Vance filed charges with the Equal Employment Opportunity Commission (hereinafter EEOC) immediately following the

termination of their grievance procedure. The filing was 154 days from the date of discharge.

4. At the time of filing of the charges, EEOC policy was to accept as timely any charge filed with 90 days of the termination of the grievance procedures. The EEOC considered plaintiffs' charges timely filed and investigated the charges, issued probable cause determinations and attempted conciliation.

5. The charges were open and were being processed by the EEOC on March 24, 1972, the effective date of the 1972 Amendments to 42 U.S.C. 2000 e-5 which included extension of the filing period from 90 days to 180 days.

6. Contrary to the statement of Petitioner Westinghouse in its Statement of Facts, there is nothing in the record to support its claim that it was not notified of the charges until August 8, 1974. Nor was this claim ever made to the trial court by any of the defendants. Defendant Westinghouse's successor in interest at the Byesville plant, co-defendant Scoville Manufacturing Company submitted for the first time at the appellate level two letters from the EEOC addressed to Scoville dated August 8, 1974 serving notice of the charges on defendant Scoville. The charges were initially filed against defendant Westinghouse and since defendant Scoville had no interest in the plant at that time

and for years thereafter, it is not surprising that Scoville was sent notification from the EEOC at a later date.

REASONS WHY THIS CAUSE SHOULD NOT BE REVIEWED

None of the conditions stated in Rule 17 of this court's rules are present in this case. There is no conflict whatsoever among the federal court of appeals which have considered the issue presented by this case.

The Ninth, Eighth, and Sixth Circuit Courts of Appeals all have ruled that: the amendment extending the period for the filing of charges with the EEOC from 90 days to 180 days applies to charges still pending

before the EEOC but filed more than 180 days prior to the effective date of the amendment. Inda v. United Air Lines, Inc., 565 F.2d 554 (9th Cir. 1977), cert. denied, 435 U.S. 1007 (1978); Wood v. Southwestern Bell Telephone Co., 580 F.2d 339 (8th Cir. 1978); Hunter v. Westinghouse Electric Corp., 616 F.2d 267 (6th Cir. 1980). In addition, the Seventh Circuit Court of Appeals, while not required to reach this specific issue in its decision, cited the reasoning of the Ninth Circuit in Inda with approval. McDonald v. United Air Lines, Inc., 587 F.2d 357, 361 n.10 (7th Cir. 1978), reh. denied, cert. denied, 99 S.Ct. 2869 (1979).

1. THE NINTH, EIGHTH, SEVENTH AND SIXTH CIRCUIT COURTS OF APPEALS HAVE

CORRECTLY INTERPRETED THE 1972 AMENDMENTS TO THE CIVIL RIGHTS ACT OF 1964.

The 1972 Amendments to 42 U.S.C. 2000 e-5 included the extension of the period for filing charges with the EEOC from 90 days to 180 days. The amendments also provided that the amendments "shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter." Equal Employment Opportunity Act of 1972 Pub. L. No. 92-261 14, 86 Stat. 103.

This court discussed the meaning of pending as it appears in the above cited Section 14 in the case of International Union of Electrical Workers, Local 790 v. Robbins &

Meyers, Inc., 429 U.S. 229 (1976) (hereinafter cited as Electrical Workers). That case involved a charge filed more than 90 days after the alleged discriminatory act but within 180 days of the enactment of the amendments. This Court stated:

> This reading of "pending" - confining to charges still before the Commission and timely when filed - is not the only possible meaning of the word, is largely rebutted by the legislative history,16 and renders the language of §14 virtually meaningless insofar as the enlarged limitations period is concerned.
>
> * * *
>
> "Pending" is simply not a term of art that unambiguously carries with it a meaning precisely suited for this situation; equally logical, for example would be an interpretation that read "pending" to mean "filed and not yet rejected."
>
> 16/ Section 14 was stated to be designed to cover "charges filed with the Commission prior to the effective date of the Act. Com-

mittee Legis. Hist., at 1851.
429 U.S., at 242 (emphasis added)

In a footnote to the decision, this Court expressly declined to rule whether the amendments apply to charges filed "more than 90, but less than 180, days from the date of the alleged 'occurrence', where the 180 days had run prior to March 24, 1972." It is not surprising that this Court would not reach this issue since those facts were not before the Court. However, the legislative history and the reasoning of this Court in Electrical Workers compel the conclusion that all charges which the EEOC had not finished processing as of March 24, 1972 benefited from the enlarged filing period.

Congress specifically intended the amendments to apply to charges filed with the Commission prior to the effective date of the amendments, which charges were still pending with the EEOC. There simply is no way to define the word pending that would be consistent with this Court's ruling in Electrical Workers and yet exclude the claims of these plaintiffs. As the Ninth Circuit Court of Appeals stated in Inda, 565 F.2d 554, 561, supra:

> If the charge was, on the date of enactment, on file with the Commission, and if final action had not yet been taken by the Commission with respect to the charge, the charge was pending in the sense in which that term is commonly used. It is that sense that we have attributed to Congress.

The Ninth Circuit Court of Appeals, as well as the Eighth, Seventh and

Sixth Circuits, have correctly interpreted the application of the 1972 Amendments to charges pending with the EEOC that were filed more than 90, but less than 180, days after the alleged discriminatory occurrence, where the 180 days had run prior to enactment of the amendments.

2. THE RETROACTIVE APPLICATION OF THE 1972 AMENDMENTS TO THE CIVIL RIGHTS ACT OF 1964 IS CONSTITUTIONAL AND DOES NOT OPERATE IN AN UNEQUAL OR ARBITRARY MANNER.

Petitioner is advancing the same argument that the retroactive application of the extended filing period is unconstitutional as was advanced by the employer in Electrical Workers and rejected by this Court. As stated in the Opinion:

> Robbins & Myers contends, finally, that Congress was without constitutional power to revive, by enactment, an action which, when filed, is already barred by the running of a limitations period. This contention rests on an unwarrantedly broad reading of our opinion in William Danzer Co. v. Gulf & Ship Island R. Co., 268 U.S. 633, 45 S.Ct. 612, 69 L.Ed. 1126 (1925). Danzer was given a narrow reading in the later case of Chase Securities Corp. v. Donaldson, 325 U.S. 804, 311-312, 65 S.Ct. 1137, 1141, 89 L.Ed. 1628 (1945). Electrical Workers, supra at 450.

This Court concluded that the retroactive application of the extended limitations period is constitutional.

There is no logical reason to distinguish this case from Electrical Workers as to the question of the constitutionality of the retroactive application of the extended filing periods. The discrimination charge filed in Electrical Workers was not

timely when filed and was constitutionally revived by the amendments.

Petitioner also claims that the application of the amendments retroactively affects the substantive rights not just the remedy. However, numerous courts have held that the 1972 Title VII Amendments did not create new substantive rights, but simply created new procedures and remedies for the vindication of these pre-existing rights. Brown v. General Services Administration, 507 F.2d 1300 (2d Cir. 1974); Adams v. Brinegar, 521 F.2d 129 (7th Cir. 1975).

The right to be free of discrimination in employment on account of sex was a substantive right of the plaintiffs prior to the 1972 amendments.

The amendments expanded the remedy available but did not create any new rights. In expanding the filing period, Congress realized that the prior 90 day period had caused inadvertent forfeiture of rights of untrained lay people who were unaware of their rights and remedies. The purpose of the expansion was to minimize this inadvertent loss of rights and remedies. See "Section-by-Section Analysis", 118 Cong. Rec. 7161, 7167 (1972). It is consistent with this remedial purpose to interpret Section 14 to validate arguably untimely charges which the Commission had accepted as timely and which it was processing as of March 24, 1972.

Petitioner argues that retroactively

applying the 1972 amendments to untimely charges arising from alleged discriminatory acts taking place more than 180 days prior to March 24, 1972 results in disparate treatment of similarly situated persons. Petitioner attempts to distinguish the situation in Electrical Workers by claiming that persons who filed charges based upon alleged discriminatory acts occurring within 180 days of March 24, 1972 were all treated the same. There is no difference between the classifications. Just as the charges of the plaintiffs were arguably untimely when filed, so was the charge in Electrical Workers. Just as the EEOC might have dismissed plaintiffs' charges as being untimely filed, so might the EEOC have dismissed

the charge in Electrical Workers. Just as there may be persons who filed charges under similar situations as the plaintiffs and the charges were dismissed, so may there have been persons similarly situated to the employee in Electrical Workers, whose charges were dismissed.

In addition, the claim that class of employees who will benefit from the retroactive application in a classification based upon the fortuity of administrative incompetence is not accurate. There was a "reasonable basis" for the fact that the EEOC considered the plaintiffs' and other similarly situated employees' charges as timely filed. That basis was that the EEOC considered the filing period

to be tolled during the pendency of grievance or arbitration procedures. As indicated in the record before the trial court, that was the reason that the EEOC considered the plaintiffs' charges to be timely filed. It was not until this Court's decision in Electrical Workers that the policy of the EEOC to accept such charges was invalidated.

The petitioner will not be deprived of due process of law if the 1972 amendments are applied to this case. Defendant Westinghouse was put on notice by the filing of the charge and has been given the opportunity to gather and preserve evidence in anticipation of administrative and court action. Occidental Life Ins. Co. v.

EEOC, 432 U.S. 355 (1977). As long as the charges were pending with the EEOC, Westinghouse could anticipate a Title VII suit and should therefore have maintained relevant records.

The fact that plaintiffs' charges were pending would not in any way affect Westinghouse's decision to sell the Byersville plant to Scoville. Nor would it affect Westinghouse's decision where to place the plant management personnel from the Byersville plant. All of these decisions were made by Westinghouse in its own estimation of its economic interests. Whatever effect these factors may have in a trial on the merits of this case are in no way attributable to plaintiffs but to Westinghouse's business

decisions. All parties, including plaintiffs, suffer the same difficulty locating witnesses and records when litigation is exended over several years.

Based on this Court's ruling in Electrical Workers and the fact that Westinghouse will not be deprived of property without due process, the retroactive application of the 1972 Amendments to this case is constitutional.

CONCLUSION

There is no conflict among the Circuit Courts of Appeals which have decided the issue presented by this case. Those decisions by the Courts of Appeals are consistent extensions of the logic and reasoning of this Court's decision in Electrical Workers. This Court has already ruled that the

retroactive application of the 1972 amendments is constitutional. This case does not involve an important question of federal law which affects many individuals. For all of the above reasons, Petitioner Westinghouse's Petition For Writ of Certiorari should be denied.

Respectfully submitted,

Alexander M. Spater
SPATER, GITTES & TERZIAN
595 East Broad Street
Columbus, Ohio 43215
Attorney for Respondents

Barbara A. Terzian
SPATER, GITTES & TERZIAN
Of Counsel